

Yang (Migration) [2019] AATA 3690 (28 June 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Srey Yang
VISA APPLICANT:	Mr Tuan Tuyen Nguyen
CASE NUMBER:	1716560
DIBP REFERENCE(S):	OSF2016/038385
MEMBER:	Stephen Conwell
DATE:	28 June 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 28 June 2019 at 12:28pm

1. **CATCHWORDS**

2. *MIGRATION – Partner (Provisional) (Class UF) – Subclass 309 (Spouse (Provisional)) – genuine spousal relationship – marriage certificate – insufficient evidence provided upon review – decision under review affirmed*

3.

4. **LEGISLATION**

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), Schedule 2 cls 309.211, 309.211, r 1.15A(3)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the Migration Act 1958 (the Act).
6. The visa applicant applied for the visa on the basis of his relationship with his sponsor, Ms Srey Yang (the Sponsor). At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
7. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because she could not be satisfied that the parties are in a genuine spousal relationship.
8. The Sponsor appeared before the Tribunal on 17 June 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Tuan Tuyen Nguyen, who is the visa applicant.
9. The Sponsor was represented in relation to the review by her registered migration agent who attended the Tribunal hearing.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in the present case is whether visa applicant, visa applicant and the Sponsor are in a genuine spousal relationship.

Whether the parties are in a spouse or de facto relationship

12. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the Sponsor who is an Australian citizen.
13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).
14. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and Sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties produced a Marriage Certificate issued in Ho Chi Minh City, Vietnam and bearing the registration date of 10 November 2015. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

16. The Sponsor is a 60-year-old Australian citizen. According to the evidence she divorced her first husband in Australia on 26 August 1997. They are no children from that marriage. The decision record notes that she had a de facto relationship with another (unnamed) man with whom she had two children (born in 1991 and in 1997).
17. The visa applicant, Mr. Nguyen, is a 39-year-old male and citizen of Vietnam. He declares to have had no previous marriages or de facto relationships. He has a business in Vietnam as an intermediary supplying seafood and other produce between wholesalers and restaurants. He is the youngest of nine children in his family. He has two sisters and one niece living in Australia.
18. According to the decision record, the Sponsor had a nail and beauty business for many years. One of her employees was the visa applicant's sister. In early January 2015 the visa applicant happened to telephone his sister at her work and he had a conversation with the Sponsor when she answered the telephone. From that time the Sponsor and visa applicant spoke regularly via telephone, however few telephone records were submitted to support this claim. In early August 2015 via a telephone call, Mr. Nguyen proposed marriage to the Sponsor, and two days later she accepted the proposal. The parties had not yet met in person at time of the marriage proposal and its acceptance.
19. The parties first met when the Sponsor and visa applicant's sister (the Sponsor's employee) travelled to Vietnam on 13 October 2015 for the wedding, which took place three days later on 16 October 2015. The Sponsor returned to Australia 15 days later on 28 October 2015. Just over a week later, on 9 November 2015 the Sponsor travelled again to Vietnam to sign the marriage certificate the following day.
20. The Sponsor remained in Vietnam for eight days, during which time she and Mr. Nguyen's family spent time together, including a visit to Chau Doc in An Giang Province. The Sponsor returned to Australia on 17 November 2015.
21. The Tribunal notes Sponsor's two adult children did not attend the wedding. She claims that she did not raise them - they were raised by their father. The Sponsor does not have much to do with them and was vague about their lives and interests. The Tribunal therefore gives little weight to the fact that the Sponsor's two adult children did not attend the parties' wedding.
22. The following year the Sponsor made two more visits to Vietnam – she travelled there from 17 - 26 May 2016 (nine days), and again from 19 October-5 November 2016 (17 days). In 2017 the Sponsor did not depart Australia, which the Sponsor explains was due to her financial difficulties at the time which culminated in her bankruptcy. No evidence of the Sponsor's bankruptcy was submitted to the Tribunal, however the Tribunal is prepared to accept that the Sponsor experienced financial difficulties with her nail and beauty business in Australia in 2017.
23. In 2018 the Sponsor travelled to Vietnam on a seven-day visit from 16 – 23 November 2018. Most recently the Sponsor travelled to their home for 19 days from seven – 26 March 2019. Overall the applicants appear to have spent approximately 10 weeks (76 days) together.
24. The Tribunal has regard to the fact that the visa applicant proposed to the Sponsor after seven months of telephone contact and without having met each other. The Tribunal does

not consider it plausible that the parties would have made such a major commitment and that they held a mutual and genuine intention that the marriage would be long term, when they barely knew each other and had not yet met in person. The Tribunal is asked to believe that they were planning a life together in Australia on the strength of these telephone conversations between January and August 2015. The Tribunal has difficulty accepting these circumstances as evidence of the parties' mutual and genuine intention to a spousal relationship.

25. The visa application was lodged on 17 June 2016 and the visas were refused on 27 June 2017. On 5 November 2016 the Sponsor returned to Australia from Vietnam. It would be over 12 months later, (when the Sponsor returned to Vietnam) on 16 November 2018 that the parties would see each other again. Whilst the Tribunal accepts that the Sponsor experienced financial difficulties during 2017, it might have been possible for the parties committed to a spousal relationship to arrange to meet in Australia, in Vietnam or elsewhere, perhaps by the visa applicant, who is self-employed, finding the means to fund such a meeting. The Tribunal considers this a long separation for a couple claiming to be in a committed and intimate married relationship.

26. *Financial aspects of the relationship*

27. The Tribunal has considered any joint ownership of real estate or other assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party, and any sharing of day-to-day household expenses in assessing the financial aspects of the relationship.
28. The decision record notes that between 29 September 2015 – 24 May 2016 the Sponsor made money transfers to the visa applicant, totalling \$4,500 AUD. There is also evidence of the Sponsor making a money transfer to the visa applicant of \$400 AUD on 23 February 2018 and of \$204 AUD on 5 November 2018. Even though the visa applicant maintained that he does not need such support given that he derives his own income from work, these nonetheless constitute evidence of some material support.
29. The parties provided evidence of having opened a joint bank account in Vietnam on 20 October 2015. The parties claim that this account is used to pay household bills and travel expenses when the Sponsor is in Vietnam. The Tribunal accepts that the parties have opened a joint bank account in Vietnam however there is no evidence of the transaction history of this account to corroborate its joint usage by the parties.
30. The Tribunal acknowledges the difficulty of providing evidence of this type given that the parties live in separate countries and claim to be self-supported financially. The Tribunal therefore gives this aspect little weight in considering the application.

31. *Nature of the household*

32. The Tribunal has considered any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework in assessing the nature of the household.
33. The visa applicant has no children. The Sponsor has two adult children with whom she appears to have little regular contact. The Tribunal therefore has no need to consider any joint responsibility for the care and support of children.
34. The delegate in her decision conceded the difficulty the parties faced at the time of application in demonstrating the nature of their household as being one of a genuine couple. The Tribunal estimates that the Sponsor has spent a further two periods of time in Vietnam (in 2018 and 2019) for a total of 76 days.
35. At hearing, the parties gave consistent evidence that the Sponsor has stayed at the visa applicant's home during her visits to Vietnam. There is evidence, which the Tribunal accepts,

that the Sponsor has been registered with local authorities as a visitor when staying at the visa applicant's home.

36. Given that the parties have only spent some 10 weeks together since their marriage, as well as a period of some 12 months where they did not meet, there is only limited weight that can be given to this factor

37. *Social aspects of the relationship*

38. The Tribunal has considered whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake joint social activities in assessing the social aspects of the relationship.
39. The Tribunal acknowledges the photographs showing their wedding in October 2015 and subsequent holiday together. There are also photos from 2016 at the airport and on holiday together. There are some photos of a video call between the parties in 2017 when the Sponsor made no overseas trips. Finally there are a few undated photos of the applicants sharing a meal on different occasions with friends or family. There are also photocopies of photos from the Sponsor's visits to Vietnam in 2016, 2018 and 2019 either at the airport, on holidays or sharing a meal with family and friends.
40. Statutory declarations by two Australian citizens - Franzese Prospero and Radovan Laski have been tendered in support of the application. Mr Prospero is a solicitor who has come to know the Sponsor both in a business and social capacity. Mr Laski is a friend of the Sponsor who has travelled on holidays with the sponsor to Vietnam and has met the visa applicant in these circumstances. Mr Laski also appeared at hearing to give evidence along with the visa applicant's sister, an Australian citizen. Although Mr Prospero did not appear before the Tribunal, both his statutory declaration and that of Mr Laski's expressed a belief that the parties are in a genuine spousal relationship - a view shared by the visa applicant's sister at the hearing.
41. There are also statutory declarations from a few of the visa applicant's friends and family in Vietnam expressing the same belief in the genuineness of the parties' spousal relationship. The Tribunal notes that the statutory declaration from Mr Kieu Van Loc, a friend of visa applicant's, contains a second paragraph which is a direct copy of the second paragraph from the statutory declaration by visa applicant's uncle, Mr Hua Manh Hung. The second paragraph common to both statutory declarations says:
42. "Since then, every time Mrs SREY YANG returned to Vietnam, she's always resided in
43. my nephew's house during her stays in Vietnam. Their marital couple have often
44. invited me to hang around and/or eat out."
- 45.
46. Both declarations are dated 24 May 2019. Since Mr Kieu Van Loc claims to be a friend of visa applicant and not his uncle, the Tribunal queries the credibility of these statutory declarations.
47. The Tribunal considers that this information shows that the parties represented themselves at and around the time of the party to a limited but important number of people as being in a relationship, being the visa applicant's family and relatives, along with selected friends of the Sponsor. The Tribunal notes that the Sponsor's parents are dead and although she has a brother and sister both living in Australia, it accepts her evidence that she is no longer in contact with her siblings. The Tribunal also accepts that the Sponsor is likely to be estranged from her two adult children.

48. Although it is accepted they are legally married, nevertheless the Tribunal is not satisfied, on the evidence, that at the time of this decision the parties, represent themselves widely as being in a genuine marriage.

49. *Nature of parties' commitment to each other*

50. The Tribunal has considered the duration of the parties' relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long-term in assessing the nature of the parties' commitment to each other.

51. The parties had only spoken via telephone calls over seven months before deciding to marry. They first met in person on 13 October 2015, when the Sponsor travelled to Vietnam, along with visa applicant's sister. They married three days later on 16 October. The Sponsor spent 15 days in Vietnam in company with visa applicant before returning to Australia. The Sponsor returned to Vietnam 12 days later to sign the marriage certificate.

52. The Sponsor has submitted telephone records relating to her mobile phone for the period between March and April 2018. There are seven calls to mobile phones in Vietnam during this period. Five calls are to the same mobile phone number. There are no phone records of previous years, although the Sponsor claimed at hearing that she and visa applicant were attempting to provide further evidence of phone records. At the time of decision no further evidence has been provided. Due to the paucity of the phone records submitted, the Tribunal gives little weight to this information given the narrow time period to which the submitted evidence relates.

53. The Sponsor stated at hearing that visa applicant is not concerned at the 20 year age difference between the parties. The Sponsor claims that the visa applicant is her first serious relationship since her divorce in 1997.

54. The Sponsor and visa applicant gave consistent evidence as to what would occur should the visa applicant be granted a visa to come to Australia. He would live with the Sponsor in her rental accommodation and would learn English. There is evidence that visa applicant has been included on the Sponsor's current tenancy agreement, along with two other co-tenants.

55. The Sponsor claims that upon his arrival in Australia the visa applicant would do whatever work he could find. Once his English proficiency improved, he would seek to replicate his 'seafood intermediary' business that he has in Vietnam. The Sponsor is now employed in the nail and beauty business; it appears that she no longer has her own business, due to her financial difficulties in 2017, although she was unclear about this.

56. The parties claim to have remained in regular contact by telephone and social media since their first telephone conversation in January 2015. In support of this, the Sponsor tendered telephone records from 20 March to 19 April 2018. This is a month of phone records in support of a relationship that was ostensibly established over four years ago. Furthermore it is not possible for the Tribunal to identify the sender and recipient of the phone call entries. If any material was appended to these communications, it was not included. On the paucity of evidence provided, the Tribunal is not persuaded that the parties are frequently in touch.

57. On the evidence they have presented, the Tribunal finds very little collateral support for the parties' claims to having a deep and mutually supportive relationship. Similarly, given the vagueness of the parties' evidence as to their plans once they settle in Australia, the Tribunal cannot be satisfied that the parties genuinely see the relationship as long-term.

58. Weighing all of the evidence before it, the Tribunal cannot be satisfied that the parties have made a mutual commitment to a shared life to the exclusion of others, or that theirs is a genuine and continuing relationship, or that it is their intention to live together on a permanent basis.

59. **CONCLUSION**

60. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made or the time of this decision. Therefore the visa applicant does not meet cl.309.211 or cl.309.221.
61. Since neither of the principal applicants satisfies the primary criteria for the grant of a partner visa, none of the other applicants is able to satisfy cl.100.321, which requires an applicant to be the holder of a Subclass 309 visa or a Subclass 445 (Dependent Child) visa granted on the basis of the applicant being the dependant or member of the family unit of another person who is the holder of a Subclass 309 visa and who has been granted a Subclass 100 visa.
62. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

63. The Tribunal affirms the decisions not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Stephen Conwell
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).